IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 51

UNITED STATES OF AMERICA,
Appellant,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF OF APPELLEE, THE PROCTER & GAMBLE COMPANY

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INDEX

CITATIONS

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COUNTER-QUESTIONS PRESENTED

1. Where the District Court has ordered plaintiff-appellant (hereinafter called "plaintiff") to produce documents and thereafter plaintiff moved to have the order changed to provide for dismissal if it does not produce, is the plaintiff entitled to appellate review when the District Court dismissed after plaintiff's failure to produce? (See Procter's* Motion to Dismiss or Affirm, filed January 2, 1957** [see R. 565]).

2. Did the court below, in the circumstances of this case, abuse its discretion in ordering plaintiff to produce grand jury transcripts of testimony which were taken, retained and used by plaintiff in the preparation of this civil action, and are relevant to and needed by defendants for such preparation?

*The Procter & Gamble Company is referred to herein as "Procter".
**Hereinafter referred to as "Motion to Dismiss Appeal".

COUNTER-STATEMENT OF FACTS

Certain inadequacies and inaccuracies in plaintiff's brief (arising, no doubt, from inadvertence or lack of familiarity with the record) require correction and comment.

The complaint in this action was filed on December 11, 1952, only sixteen days after the discharge, without return of indictments, of a grand jury which from May 1951 to November 25, 1952 investigated the same matters which are complained of in this civil action (R. 1-16, 119, 121, 207-8, 343, 386-8, 473-4).

In the proceedings before the grand jury, Procter and the other defendants had produced a large number of documents, and the testimony of twenty-eight to thirty witnesses was taken (R. 311, 385, 430-1, 471). In March 1953, plaintiff moved for and obtained from Procter under Rule 34 of the Civil Rules, production of the identical documents submitted by it, alleging, as the court below also found, that they were "needed" to aid plaintiff in the preparation of this action (R. 48-52, 58-9, 220-1, 387, 392-4).

In connection with its motion and on other occasions plaintiff conceded—and the District Court found—that plaintiff used the grand jury proceeding, in part at least, to prepare for this action (R. 59, 211-12, 387, 402, 104, 54-5, 525). For example, plaintiff stated that "The filing of the complaint results from a careful and thorough investigation of this industry, including extensive grand jury proceedings" (R. 387, 402).

Procter, actuated by plaintiff's continued use of the grand jury evidence in the civil case, moved in September 1954 for leave to inspect and copy the transcripts of the grand jury testimony* (R. 118-21, 274, 276, 337-41).

The motion was not heard by the District Court until December 12, 1955. From this lapse of time, plaintiff pur-

*It did not seek to discover the deliberations or other proceedings of the grand jury itself.

to utilize it for perjured charges (Emphasis not supplied).

* * * * *

"But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused * * *."

Since in this case the grand jury has long been discharged without indicting, there is no "historic principle" precluding disclosure of the transcripts. The criminal cases on which plaintiff relies in support of the principle are inapplicable. They are primarily cases where the accused sought access to the minutes to aid in quashing the indictment (P's Br. p. 38). As the court below astutely recognized (R. 215), the issue in such cases is not pretrial *discovery*, but the administrative question of whether the accused should be permitted to have in effect a "preliminary trial" or an appeal to test the "adequacy of the evidence before the grand jury" supporting the indictment. See *Costello* v. *United States*, 350 U. S. 359, 363.

Apart from these criminal cases, plaintiff refers only to a few civil cases in the district courts involving disclosure of grand jury transcripts (P's Br. pp. 42-3). In none of these cases, we submit, is there an opinion sufficiently elucidative to permit comparison with the instant case. In most, there was no opinion at all. In at least two, as the court below noted (R. 216-7), the decisions uncritically followed the line of criminal cases mentioned above. In several, it is apparent that the severe administrative problems of the "big case" were not involved. In none is it clear that the court had before it or took into account the important consideration presented in the case at bar, namely, whether or to what extent plaintiff utilized the grand jury proceeding for pre-complaint discovery and for preparation of the civil case. Indeed, in at least one case (*United States* v. *Standard Oil Company of California*, Civil No. 11584-C, S. D. Cal., C. Div., unreported), the decision was

orts to deduce (P's Br. pp. 8-9, 48) that Procter sought the ranscripts, not to discover the facts, but to ascertain exactly ow prospective witnesses "had cast their testimony".* This eduction is entirely without basis in fact. The record clearly nd definitely shows that from the time Procter moved for roduction in September 1954, it stood ready at all times to rgue its motion (unprinted transcripts of Oct. 14, 1954, Tr. 361-2; Dec. 7, 1954, Tr. 984; Apr. 19, 1955, Tr. 863, 876-7). The court below, however, with the concurrence of ll parties, including the plaintiff, deferred hearing until do- umentary discovery was concluded. As the court said (un- rinted transcript of Nov. 14, 1955, Tr. 1169):

> "* * * it was my intention first to get through with the examination of the countless documents that are going to be involved in this case, after which I thought there would be probably oral depositions taken [during the progress of the case], at which time you would raise the questions [grand jury transcript] which seem to be raised now."

The court set the matter for hearing when it did because he issue raised was squarely presented by plaintiff's motion to ake the deposition of a grand jury witness (unprinted tran- cript of November 14, 1955, Tr. 1166-9). There was never ny suggestion by defendants or the court or, until now, by laintiff, that the transcripts were desired solely for use in con- ection with the examination of witnesses.

The motions for production of the transcripts were heard y the court for two full days (R. 136-206, 128-34). In its pinions of April 17, 1956 and July 9, 1956, the District Court eld that since plaintiff had used and was using the transcripts n this civil action; since the transcripts were unquestionably

*It should also be noted that the quotation at the bottom of page 8 and the top of page 49 of plaintiff's brief did not come from the roceedings in this case, as a casual reading might indicate, but from *afeway Stores* v. *Reynolds*, C. A. D. C., 176 F. 2d 476, 478.

based upon a claim of privilege (R. 357), a claim which plaintiff has wholly abandoned here (P's Br. p. 31, fn. 13).

(4) Production of the Transcripts Would Not Discourage Testimony Before Future Grand Juries.

Plaintiff's argument in favor of secrecy of grand jury transcripts is essentially based on the claim that free and untrammeled testimony by future grand jury witnesses will be discouraged by the decision below.

Such claim is fallacious because no grand jury witness can testify with any assurance that his testimony will remain secret. Here are some of the reasons why:

(a) Criminal Rule 6(e) and many controlling authorities recognize the power of the courts to order disclosure.

(b) The liberal discovery provisions of the Civil Rules also make assurance of secrecy impossible. On depositions a witness may be interrogated as to what testimony he had given before the grand jury and, if he is truthful, he must reveal it to the extent he might remember it.* See *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 201. If he is untruthful, he is not a person entitled to protection. 8 *Wigmore on Evidence* (3d ed., 1940) § 2362.

(c) The Government admits that it feels free to use testimony taken before a grand jury in a civil, as well as a criminal case, and to seek public disclosure when to its interests to do so (R. 197-8, 274, 276). It has made open use of such testimony in the past, *Socony-Vacuum* being a prime example. It has used and plans to use further the transcripts in this case (R. 274, 276).

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*Plaintiff has suggested the taking of the depositions of the grand jury witnesses in this case, having offered to disclose the names of such witnesses (R. 294). This would certainly negative any assurance of secrecy to these witnesses even though, as we shall later point out, such depositions would not give the defendants all of the information to which they are properly entitled.

relevant; since defendants likewise needed and should have equal access to the transcripts; and since there was no applicable reason for preserving secrecy, the ends of justice, in this complicated and protracted antitrust litigation, required disclosure of the transcripts to defendants (R. 206-39, 257-62).

Orders of July 23, 1956, consented to as to form by all parties, including the plaintiff, directed plaintiff to produce the transcripts for inspection within thirty days (R. 262-7). On the same day, plaintiff's counsel formally announced in open court that the Government declined to and would not at any time produce the transcripts called for by the orders (R. 330-1).

The ensuing proceedings which led to dismissal of the action are fully described in Procter's Motion to Dismiss the Appeal. They may be briefly summarized as follows.

Before the thirty days expired, plaintiff moved for an amended order in substitution for the production orders of July 23 and tendered a proposed amended order providing that "unless the plaintiff on or before August 24, 1956 produces * * * the aforesaid transcripts * * * the Court will enter an order dismissing the complaint herein" (R. 318). Only in the event the court declined to enter such an order did plaintiff ask for a stay pending an appeal or application to this Court for an extraordinary writ (R. 317, 333, 334).

Plaintiff erroneously asserts (P's Br. pp. 11, 19, 22, 29), that Procter and the other defendants "acquiesced" in and "did not oppose" the amended order initiated by plaintiff. What actually happened was that Procter, for example, specifically informed the court orally and in writing that it thought that the production order of July 23rd was "a proper and *sufficient** order", necessarily meaning that Procter did not favor the proposed amended order. Without "waiving this position", it then merely stated the obvious, that plaintiff's "proposed *relief* of production or [of] dismissal does not seem to be a re-

*Emphasis supplied throughout unless otherwise noted.

(d) Indeed, the Department of Justice has publicly announced, without qualification, that in civil antitrust cases it intends to use the grand jury proceedings (including transcripts of testimony) (R. 210-11). This is full notice to grand jury witnesses that their testimony is not likely to be cloaked in secrecy.

(e) As the District Court said (R. 214), the guarantee of secrecy to the witness is at most temporary and ceases when the grand jury is discharged. To extend the guarantee further would encourage perjury. *U. S. v. Socony Vacuum Oil Co.*, *supra*, p. 233-4; *United States v. Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 201; 8 *Wigmore on Evidence* (3d ed., 1940) § 2362.

In view of the foregoing respects in which resort may be had to grand jury testimony, we submit that it cannot fairly be urged that the production of the transcripts in this case would have any adverse effect upon future grand juries.

(5) The District Court's Ruling Is Not a Precedent for Expanded Use of Grand Jury Transcripts.

Apart from the above reasons, the production orders in this case are not, as plaintiff would have this Court believe (P's Br. pp. 38-44), precedents for disclosure in any other case. Each case must be decided on its own facts. Indeed facts similar to those here involved could not arise other than in protracted civil litigation where the grand jury proceedings were used as pre-complaint discovery, where the Government admittedly made use of the transcripts to prepare for trial, where, as we will show, the defendants need the transcripts in order adequately to prepare their defense and where solution of complex administrative problems demands the fullest possible discovery.

The narrow scope of the decision below was, indeed, made abundantly clear by the District Court (R. 303, 307, 310):

> "It was not my intention, of course, to tear the curtain right off the grand jury for any purpose. I thought that my opinion was very careful, and I was only judging the facts in this case, and this type of litigation.
>
> * * *
>
> "In other words, I don't want to make a burdensome Big case more burdensome for anybody. It is bad enough at its best. * * *
>
> * * *
>
> "* * * when I wrote this opinion I had one type of litigation in mind—an antitrust suit. I am not worrying about a suit involving an Air Force plane, I am thinking about an antitrust suit, something that is tailored for antitrust suits alone, unless we are going to live a lifetime in trying one a generation."

And even the plaintiff conceded that its concern as to the policy considerations involved would be lessened if the decision below was limited to antitrust cases.* Yet, as pointed out above, the court in fact so limited its decision, stating "when I wrote this opinion I had one type of litigation in mind—an antitrust suit" (R. 310).

In the light of all of the above considerations, we submit that plaintiff has cited no valid reason which weighs against "the policy which seeks to leave no stone unturned in seeking justice in * * * [this] particular case". *Herzog* v. *United States*, *supra*, p. 352.

In the remainder of this brief we will set forth the affirmative reasons why the District Court properly exercised its discretion in ordering the production of the grand jury transcripts.

(6) The Relevancy of the Grand Jury Transcripts.

On principle, we maintain that, in the setting of this case, it should suffice to sustain disclosure of the transcripts to show that they are relevant to the case. Little, if any, more should

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*Plaintiff's counsel stated that it "would take a less serious view of this matter if we thought that the result of any ruling * * * could be limited to antitrust situations" (R. 310).

lief which Procter *could* in any manner oppose" (R. 334, 323-4, 335-6).

On August 21, 1956, the court signed plaintiff's proposed order (R. 322-3). When, in accordance with plaintiff's formal announcement a month earlier, it did not produce, the action was dismissed on September 13, 1956, *"as provided in the amended order"* (R. 361, 362, 325-6). The quoted phrase shows that plaintiff is again in error when it states (P's Br. p. 12) that the court "recognized" that dismissal was not the result of the amended order.

Plaintiff likewise errs in stating that "the court selected dismissal as the consequence of non-compliance" (P's Br. p. 12). Plaintiff was the one who selected dismissal as the specific and sole consequence of non-compliance. There were several alternative consequences, and dismissal was not a necessary one. Dismissal was never suggested by either the court or the defendants.

SUMMARY OF ARGUMENT

1. This Court Should Either Dismiss the Appeal or Affirm the Dismissal Judgments Without Consideration of the Merits, Because the Judgments Were Invited and Consented to By Plaintiff. Plaintiff, by moving for and obtaining an amended order, providing specifically for dismissal in the event of failure to produce the transcripts, thereby invited and consented to the dismissal which followed its failure to produce, and has no right to maintain an appeal from such dismissal (See Procter's Motion to Dismiss Appeal). None of plaintiff's contentions or authorities (P's Br. pp. 17-30) disturbs this conclusion.

2. The District Court Did Not Abuse Its Discretion in Ordering Plaintiff to Produce the Grand Jury Transcripts. The District Court has power to determine, in the exercise of its discretion, whether transcripts of grand jury testimony

be required. In the instant case, relevancy, in fact, is unquestioned. As the District Court found, "* * * such a contention [of irrelevancy] would be disingenuous in view of the fact of plaintiff's use of the transcripts" (R. 213, 338, 473-4).

(7) The Defendants' Need for the Transcripts.

It is significant, however, that the District Court required much more of defendants than the necessary showing of relevancy. It stated that "a strong and positive showing [of need] should be required of persons seeking to break the seal of secrecy, which never should be done except in extreme instances, * * *" (R. 217).

The District Court found that, on the record, an adequate showing had been made to satisfy even its strict standard. It said (R. 217):

> "I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy".

Such findings, made by a judge to whom the case has been assigned from the beginning, must control unless "clearly erroneous". *United States* v. *Oregon Med. Soc.*, 343 U. S. 326; *United States* v. *Yellow Cab Co.*, 338 U. S. 338. The facts fully justified the court's findings.

The defendants' need for the transcripts was clearly demonstrated by plaintiff's admitted use of them for its discovery and in the preparation of its case (R. 274, 276). In addition, as we have noted above, plaintiff in securing an order for access to the grand jury material asserted that it was relevant and "needed to aid the plaintiff in the preparation of its case" (R. 52, 58-9, 392-3). Plaintiff there asserted that this "need" was sufficient "good cause" to support its motion.*

*But when the same "good cause" and more is shown in support of defendants' motions, the plaintiff now inconsistently argues not only that it is insufficient but that the court's finding of need represents an abuse of discretion.

within its control should be disclosed, and plaintiff has failed to show an abuse of discretion. Plaintiff's principal contention is that defendants did not meet the "good cause" test of *Hickman* v. *Taylor*, 329 U. S. 495. But *Hickman* enunciates no test of "good cause" universally applicable. In each case disclosure depends on weighing the needs of the party seeking disclosure against countervailing considerations, if any.

Here, there are no applicable countervailing considerations. For there is no controlling "historic principle" of secrecy precluding disclosure of grand jury transcripts for civil discovery purposes, and production would not deter "free and untrammeled disclosures" by witnesses before future grand juries. On principle, therefore, defendants should be required to show little, if any, more than relevancy, which was unquestioned.

In any event, the District Court imposed on defendants a "strong and positive" test of "good cause" and held that defendants had satisfied the requirements of that test (R. 217). The court below, by virtue of its intimate familiarity with the history of this protracted antitrust litigation, knew the difficult and peculiar administrative problems involved and the unequal status of the parties with respect to their ability to prepare. It found that plaintiff had admittedly used the grand jury to prepare for a civil case, that plaintiff was admittedly using the transcripts to prepare for trial, that defendants would be aided in their preparation by having access to them, that defendants could not obtain such information in any other manner, and that any requirement of secrecy could be safely waived in this particular case. These findings have not been and, we respectfully submit, cannot be successfully challenged.

In addition to the documentary material to which plaintiff secured access, plaintiff has also admittedly taken and used the transcripts of the grand jury testimony, all of which were necessarily a part and parcel of the composite grand jury evidence.

In view of the foregoing, the District Court properly found that plaintiff's use of the transcript is "perhaps sufficient reason why the ends of justice require production of the transcripts for defendants' use" (R. 213).

As also bearing upon the question of the defendants' need, the District Court found that defendants would be "aided by such production" (R. 213). This is especially true in this particular case. While proof in antitrust litigation is generally documentary in character, plaintiff has not denied that it proposes to rely on oral testimony concerning conversations and other matters in this case, perhaps to an important extent (R. 170, 526).

(8) Equal Access to the Facts Should be Accorded All Parties.

Moreover, without disclosure to defendants, plaintiff could cull from the transcripts information which supported its case, while Procter would never know whether the testimony before the grand jury contained information useful to its defense or reasonably calculated to lead to discovery of admissible evidence. The transcripts may be used by plaintiff to serve as a guide to prepare for examination and cross-examination, and for interrogatories, stipulations, admissions and other pre-trial discovery. Only disclosure to defendants would afford them an equal benefit, which presently they lack. Giving the plaintiff an exclusive advantage, particularly unconscionable when derived from judicial records, could vitally affect the outcome of the litigation. The trial, instead of being on the merits, could turn on surprise or on presentation of less than all the relevant facts. Without the transcripts the defendants would never know whether all material facts were presented to the court (R. 119-21, 341, 526).

ARGUMENT

I.

THIS COURT SHOULD EITHER DISMISS THE APPEAL OR AFFIRM THE DISMISSAL JUDGMENTS WITHOUT CONSIDERATION OF THE MERITS, BECAUSE THE JUDGMENTS WERE INVITED AND CONSENTED TO BY PLAINTIFF.

Procter has fully set forth its position and the authorities in support thereof in its Motion to Dismiss the Appeal, to which the Court is respectfully referred. We will not repeat them here except as necessary to correct and reply to statements in plaintiff's brief.

A. Plaintiff Moved for Dismissal of the Case.

Plaintiff refers repeatedly (P's Br. pp. 12, 20, 21, 22, 29, 30) to what it terms its "suggestion" that the trial court dismiss the action. This is an inaccurate characterization of plaintiff's conduct. The fact is that instead of making a "suggestion" plaintiff definitely and formally moved for a dismissal in the event of non-production (R. 317-8). Since plaintiff had already unequivocally asserted in open court that it would never produce the transcripts, the necessary effect of plaintiff's invited amendment was dismissal of the action (R. 330-1). This conduct was as explicit an invitation or consent to dismissal as may be found in any of the pertinent authorities where review was denied (See Procter's Motion to Dismiss Appeal, pp. 8, 12, 15, 17).

Furthermore, plaintiff well knew that there were a "number of alternatives" (R. 332-3) available to the court as a consequence of plaintiff's refusal to produce, these including a stay, limitation of plaintiff's evidence, contempt or dismissal. No one—neither the court nor any of the parties—had previ-

Such a result would be the antithesis of the principle of mutuality of discovery and elimination of surprise, which is one of the cornerstones of the Federal Rules. See *Hickman* v. *Taylor*, 329 U. S. 495; Barron & Holtzoff, *Federal Practice and Procedure* (1950), Foreword p. v.

As this Court said in *Hickman* (p. 507):

> "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

In the case of a judicial document, transcript or otherwise, under the control of the court, it is, we submit, unthinkable that one party should enjoy exclusive access. The court should "obviously * * * treat the parties alike in their rights to relevant testimony." *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 202. We are confident that this Court will do so.

(9) Depositions Are No Substitute for Grand Jury Transcripts.

It is no answer for plaintiff to assert (P's Br. p. 47) that defendants did not claim or show that the grand jury "witnesses are no longer available or can be reached only with difficulty." In the first place, the District Court in both opinions found against plaintiff's contention, saying, "I would not grant these motions if I thought * * * defendants already possessed all the necessary information or could obtain it by pursuing a different remedy" (R. 217, 261).

Plaintiff's contention that depositions are an adequate substitute for disclosure of the transcripts is erroneous for several reasons.

(a) There were "28 or 30 witnesses", scattered from coast to coast (R. 169, 301, 311).

(b) One witness is dead and although the others may be available, it would be extremely burdensome and expensive to reach them and take their depositions (R. 472, 526-7).

ously suggested or even mentioned an order of dismissal in the event plaintiff did not produce the transcripts.

It is immaterial that plaintiff did not consent to the earlier orders that the transcripts should be produced. (See P's Br. p. 25).* This appeal is not from the production orders themselves. The only relief plaintiff seeks in this Court, and the only relief it could seek, is that the "judgments * * * dismissing the complaint * * * should be reversed" (P's Br. p. 53). Yet, judgments of dismissal were precisely what plaintiff invited.

B. *Thomsen* v. *Cayser* is Not in Point.

Plaintiff principally relies on *Thomsen* v. *Cayser*, 243 U. S. 66 (P's Br. pp. 23-6). There, the Court of Appeals had entered a judgment adverse to plaintiffs by reversing the district court's judgment in plaintiffs' favor and had remanded for a new trial. As this Court said (p. 76), the plaintiffs there *"waived any right to a new trial* and consented that the case be disposed of one way or the other." *"The plaintiffs did not consent to a judgment against them,* but only that, if there was to be such a judgment, it should be final in form* * *" (p. 83).

The line of authority represented by *Thomsen* presents very different factual and legal considerations than does the case at bar. *Thomsen* illustrates the principle that a plaintiff who in the trial court obtained judgment on the merits, which judgment was reversed by the intermediate appellate court and a new trial granted, may elect to avoid the expense of a second trial, and may stand on the record and take an appeal. In other words, plaintiff merely waives a new trial. The general principle is widely recognized and is codified by statute in some jurisdictions.**

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*It did consent to the form of the production orders thus attesting to their sufficiency (R. 263, 264, 266, 267).

**See New York Civil Practice Act § 588 (3); 3 Arkansas Statutes (1947) Annotated, Sec. 27-2101; 2 Code of Laws of South Carolina (1952) § 15-134; *Mechanical Appliance Co.* v. *A. Kieckhefer E. Co.*, 163 Wis. 647, 159 N. W. 556; *Walker, et al.* v. *Quinn et al.* 134 S. C. 510, 133 S. E. 444.

(c) The events and records which were the subject of the investigation not only covered a long period of years (R. 9), but also events which were current in 1952 and within the fresh recollection of the witnesses when they testified before the grand jury.

(d) Since the issues have not yet been finally narrowed and clarified (R. 239-40; unprinted transcript of April 19, 1955, Tr. 862) depositions would require defendants to examine the grand jury witnesses on every conceivable issue that could be raised under the Sherman Act (R. 301).

(e) Even when a case is uncomplicated or the facts as to which a witness testifies are simple, "time dulls treacherous memory", as said in *Jencks* v. *United States*, 353 U. S. 657, 667. That truism is infinitely more applicable in the case of grand jury witnesses, testifying six years ago with respect to a large industry's activities both in distant and recent years. They could not—and could not be expected to—reproduce their testimony with any degree of accuracy (R. 302, 526-7).

Thus for the foregoing reasons such depositions would not be a workable or adequate substitute for the transcripts. They could not conceivably develop all the facts which today are unavailable to defendants.

(10) The District Court Must Have Wide Discretion in Administering Complex and Protracted Litigation.

This case is one of the typical so-called "Big Cases" which "while not numerous, are of sufficient frequency to create an acute major problem in the current administration of justice" (Prettyman Report on *Procedure in Anti-trust and Other Protracted Cases*, adopted by the Judicial Conference of the United States, 13 F. R. D. 62, 64). The problem is so serious that unless it is solved "the judicial process itself in respect

This principle is in no wise applicable to the situation in the instant case, nor is it applicable to the like case of voluntary nonsuits in the trial court as a result of adverse preliminary rulings or rulings during the course of the trial. In neither of these latter situations can a plaintiff sustain an appeal from a dismissal of the case. The authorities have been discussed in Procter's Motion to Dismiss the Appeal, pp. 8-9, 12, 15-17, 19.

The inapplicability here of *Thomsen* and the similar case of *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208 (cited by plaintiff, P's Br. p. 25) is pointed up by Justice Holmes' characterization in *Federal Club* v. *National League*, 259 U. S. 200 (also relied on by plaintiff, P's Br. p. 25):

> "The appellee, the plaintiff, elected to stand on the record in order to bring the case to this Court at once, and thereupon judgment was ordered for the defendants. * * * It is not argued that the plaintiff waived any rights by its course. *Thomsen* v. *Cayser*, 243 U. S. 66" (p. 208).

In the instant case, plaintiff did not merely stand on the record. The situation here is that although there were alternative remedies, and dismissal was not a necessary consequence of non-compliance with the production orders, plaintiff affirmatively invited, moved for and consented to the very judgment it seeks to have reviewed—namely the dismissal of the complaint. To declare a case of this nature within the principle of *Thomsen* would encourage appeals from all types of interlocutory decisions arising before or during a trial.

C. Other Authorities.

Of the many cases cited in Procter's Motion to Dismiss the Appeal, plaintiff attempts to distinguish only *United States* v. *Babbitt*, 104 U. S. 767—and this on the ground that there plaintiff "consented to a change in the substance, and not just the form, of the order" (P's Br. pp. 27-8). But plaintiff's con-

sent to a dismissal of its case (as opposed to a stay, for example) is definitely of substance. Furthermore, reviewability turns on the nature of the right which appellant has waived by its consent. In *Babbitt* and in this case, the respective appellants consented to judgments against them. From an invited judgment a party cannot appeal and it matters not that the reason for the consent was to facilitate an appeal (See Procter's Motion to Dismiss the Appeal, pp. 15-6).

Plaintiff's reliance on *United States* v. *Cotton Valley Operators Committee*, 339 U. S. 940, and *United States* v. *Wallace Co.*, 336 U. S. 793, 794-5 (P's Br. pp. 21-2), is misplaced. In neither case did the plaintiff invite or consent to the dismissal. Thus, the cases differ from the instant case in respect of the very point on which appealability turns.

D. The Government Has No Special Right to Appeal From an Invited Dismissal.

A private litigant has no right to convert interlocutory orders into appealable judgments by the "simple expedient of taking a voluntary nonsuit" or inviting a dismissal. *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 296, 297. We submit that the Government has no greater right.

Nor is plaintiff's position enhanced by the claim that it sought the order to avoid embarrassment. Private parties frequently must face the consequence of disobeying court orders or awaiting a final decision in the normal course of litigation before obtaining review. See, *e. g.*, *Hickman* v. *Taylor*, 329 U. S. 495. No arm or representative of the Government has any greater privilege against embarrassment than does a private citizen.

In this respect it is plainly indefensible for plaintiff to claim that the Government, when a plaintiff in civil litigation, is to be accorded special status insofar as the standards of appealability are concerned or that less is required of it than of private

litigants. *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 177; *United States* v. *The Thekla*, 266 U. S. 328, 339-40; *Bank Line* v. *United States*, 2 Cir., 163 F. 2d 133, 138. As Mr. Justice Douglas said, in the *Anti-Fascist* case, *supra* (p. 177):

> "To let the Government adopt such lesser * * * [standards of fair dealing] as suits the convenience of its officers is to start down the totalitarian path."

Plaintiff's reference to the "broad public interest in obtaining a determination of the violation of the antitrust laws" (P's Br. p. 19) is but another example of plaintiff's efforts to invoke special privileges in this litigation (R. 127, 187-8, 211, 248, 332-4; 139, 197-9, 360, 210, 261-2). This "public policy" argument in the instant case is also more atmospheric than real. Whatever the disposition of this appeal by this Court, we know of no reason why plaintiff, if it continues to believe that there are violations of the antitrust laws which presently should be enjoined, cannot bring a new action based on such antitrust allegations as may be appropriate. If the Government prevailed, whether on the present complaint or a new one, the relief to which it would be entitled would be the same, that is, only such relief as would be necessary to enjoin now existing violations of the antitrust laws, and to insure against future violations. *United States* v. *Oregon Med. Soc.*, 343 U. S. 326.

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING PLAINTIFF TO PRODUCE THE GRAND JURY TRANSCRIPTS.

A. Grand Jury Transcripts are in the Control of the Court and Disclosure Rests Within the Court's Discretion.

The grand jury is an appendage of the court which calls it into existence, and is under the court's supervision and control.

It is not an arm of the Department of Justice. *Cobbledick* v. *United States*, 309 U. S. 323, 327; *Hale* v. *Henkel*, 201 U. S. 43, 59; *Hoffman* v. *United States*, 341 U. S. 479, 485; *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 202; *In re National Window Glass Workers*, N. D. Ohio, 287 Fed. 219, 225. Accordingly, the District Court and not the Department has the power to determine whether testimony before a grand jury should be disclosed.*

This rule of law is codified in Rule 6(e) of the Federal Rules of Criminal Procedure which provides for disclosure when directed by the District Court.** In reality, therefore, defendants' motions to produce seek disclosure of the transcripts from the District Court and not from the Government. As the court said in *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp, 197, 202:

> "It therefore follows that, strictly speaking, defense is here seeking disclosure, not from plaintiff, but from the Court itself, which obviously should treat the parties alike in their rights to relevant testimony."

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*U. S. v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4; *United States* v. *Byoir*, N. D. Tex., 58 F. Supp. 273, 274, 275; *aff'd* 5 Cir., 147 F. 2d 336; *United States* v. *Alper*, 2 Cir., 156 F. 2d 222, 226; *United States* v. *Rose*, 3 Cir., 215 F. 2d 617, 629; *Schmidt* v. *United States*, 6 Cir., 115 F. 2d 394, 397; *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 202; *United States* v. *Farrington*, N. D. N. Y., 5 Fed. 343, 346-7; *In re Grand Jury Proceedings*, E. D. Pa., 4 F. Supp. 283, 284-5; *United States* v. *White*, D. N. J., 104 F. Supp. 120, 121; see also *Atwell* v. *United States*, 4 Cir., 162 Fed. 97, 99-101; 8 *Wigmore on Evidence* (3d ed., 1940) § 2362.

**The applicability of Rule 6(e) is not confined to criminal cases. Although Criminal Rule 1 provides that the Criminal Rules "govern the procedure * * * in all *criminal proceedings* * * *", Rule 6(e) authorizes disclosure of matters occurring before a grand jury "when so directed by the court preliminarily to or in connection with a *judicial* proceeding * * *." So striking a contrast leaves no doubt that Rule 6(e) grants discretionary power to the court in *any* "judicial proceeding", including civil cases. See *United States* v. *Ben Grunstein & Sons Company, supra; In re Bullock*, D. D. C., 103 F. Supp. 639, 641; *Doe* v. *Rosenberry*, S. D. N. Y., 152 F. Supp. 403, 406.

The discretion vested in the District Court is thus derived not only from Civil Rule 34, as the plaintiff seemingly argues, but stems from three sources—the common law, Criminal Rule 6(e) and Civil Rule 34—and the propriety of the exercise of such discretion should not be tested solely by judicial constructions of "good cause" in particular and factually different cases under Rule 34.

Here, the District Court, engaged in the administration of a difficult case, was uniquely qualified to exercise its discretion to determine the needs of the respective parties. It knew the history of the litigation and the status of discovery. It was in a position to observe the reluctance of plaintiff to cooperate in mutual discovery efforts (R. 126, 218, 229, 231, 233, 329-31, 235).* It could best judge whether defendants' lack of access to the grand jury transcripts seriously hampered their ability to prepare and impaired the expeditious handling of the case (see R. 218-239).

B. The District Court Properly Exercised Its Discretion.

Plaintiff has abandoned all its contentions in the District Court save that of an alleged failure on the part of defendants to show "good cause" for production of the grand jury transcripts. And as to this contention, its position is premised solely on the unsupported theory that such "good cause" can only be shown by satisfying the relatively stringent tests adverted to in *Hickman* v. *Taylor*, 329 U. S. 495. While, as we shall later demonstrate, defendants' showing of "good cause" was sufficiently compelling to satisfy the requirements of *Hickman*, we first submit that there is no rule of law or logic which justifies the application of *Hickman* to the circumstances of this case.

*For example, as the Court below pointed out, considerable time and effort was uselessly expended because of plaintiff's refusal to admit, until the later rehearing of the motions, that it had used and intended to use the grand jury transcripts in preparing the civil case (R. 139, 197-9, 360, 209-12, 274, 276, 261-2).

(1) *Hickman* v. *Taylor* is Inapplicable.

Hickman involved an effort by plaintiff in a personal injury action to pry into the work product of defendants' attorney.* As appears from a consideration of the majority and concurring opinions, plaintiff sought from the opposing attorney two types of documents, (1) memoranda prepared and to be prepared by the lawyer himself as to the substance of oral statements made to him by witnesses, and (2) written statements by the witnesses themselves which had been procured by the lawyer as part of his preparation.

With respect to the first category, this Court held that only in a "rare situation" and upon the showing of compelling circumstances should a lawyer be required to disclose his mental "impressions" or his own memoranda of a witness' oral statements to him. It is specious to analogize, as plaintiff here attempts, the grand jury transcripts recording the actual testimony of the witnesses themselves to a lawyer's summary of what may have been told him by prospective witnesses.

As to the second type of statements in the *Hickman* case (which more closely resembles the testimony before the grand jury), the Court plainly indicated that production might have been justified had plaintiff made some showing of need, such as "hardship or injustice" or "where the witnesses * * * can be reached only with difficulty" (p. 509-11, 513). And as said in the concurring opinion, discovery of such documents may be had upon a showing of good cause no greater than that required by Rule 34. The *Hickman* decision, however, was

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*Plaintiff employs the *Hickman* case as an analogy. It does not seriously contend that grand jury transcripts are "work product" (See P's Br. p. 38). We think it plain that testimony obtained by judicial process, under the control of the court and its grand jury, is not comparable to work product. Since it is a judicial document, "It further follows that such testimony is not the 'work product' of the plaintiff, protected from disclosure, as a limited privilege, by Hickman, supra." *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, 202.

based upon the ground that "demand [was] * * * made on the basis of right, not on showing of cause" (p. 519).*

The instant case presents an entirely different situation, with relevancy and need being clearly shown. Thus, we submit, *Hickman* enunciates no principle supporting plaintiff's contentions or militating against disclosure of the grand jury transcripts.

(2) The Meaning of "Good Cause."

As plaintiff itself aptly said earlier in this case (when it sought grand jury documents under its own Rule 34 motion) (R. 392):

> "The showing of good cause required by Rule 34 varies according to the facts of the particular case and considerations of practical convenience. * * * *Moore's Federal Practice* * * * states (4 Moore's Federal Practice [2 Ed. 1950], pp. 2449-2450):
>
> " 'The party seeking inspection is required to show "good cause therefor." Considerations of practical convenience should play the *leading role* in determining what constitutes good cause.' " (Emphasis not supplied).

It was upon this basis that the plaintiff sought and the District Court ordered production of the grand jury documents.

Under many circumstances it is held that relevance alone is sufficient to constitute good cause, and in others that good cause is established by a showing that the documents would aid in the preparation of the case, would reduce expense, or that denial of access would cause hardship or injustice. *Reid* v. *Harper & Brothers*, S. D. N. Y., 17 F. R. D. 281, 283-4; *June* v. *George C. Peterson Co.*, 7 Cir., 155 F. 2d 963, 967;

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*In the *Hickman* case it was shown that an actual and full transcript of the testimony of the witnesses before the United States Steamboat Inspectors was made available to plaintiff (p. 509). In the instant case no copies of the transcript or any equivalent are available to the defendants.

Durkin v. *Pet Milk Co.*, W. D. Ark., 14 F. R. D. 385, 396; *William A. Meier Glass Co.* v. *Anchor Hocking Glass Corp.*, W. D. Pa., 11 F. R. D. 487, 490. Indeed, on the criminal side, where a more restrictive discovery philosophy prevails*, even the informer's privilege** yields where disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause * * *." *Roviaro* v. *United States*, 353 U. S. 53, 60-1 (cited by plaintiff, P's Br. p. 41).

In each case, we submit, the decision must rest upon balancing the needs of the party seeking discovery against the hardship which might be imposed on his opponent or against other applicable countervailing considerations. This should be true whether we speak of "good cause" under Civil Rule 34, or the "ends of justice" test applied specifically to disclosure of grand jury transcripts in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4. Such a balancing of equities seems implicit in Mr. Justice Douglas' observation in *Herzog* v. *United States*, 75 S. Ct. 349, 352:

> "There has been a conflict between the policy requiring secrecy of grand jury minutes and the policy which seeks to leave no stone unturned in seeking justice in a particular case." †

(3) The Historic Principle of Grand Jury Secrecy Is Inapplicable.

In considering the equities in the case at bar it is plain that, unlike *Hickman*, no prejudice or hardship could result

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*Compare, for example, *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 221, indicating a "fishing expedition" is improper in criminal cases, with *Hickman* v. *Taylor*, 329 U. S. 495, 507, where such "expeditions" in civil cases are approved.

**Plaintiff admits that all grand jury witnesses testified "under compulsion of subpoena" (P's Br. p. 41). Thus they were not informers.

†It is equally clear from *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197, where the court said (p. 199):

> "Basically, therefore, the issue here is, as to how to coordinate justly the policy of the Federal Rules of Civil Procedure for free, full discovery before trial for both parties, with the traditional policy as to the secrecy of Grand Jury proceedings."

to plaintiff itself, as a litigant in this case, from the production of the transcripts. Nor does plaintiff make any such claim. Instead, plaintiff, assuming to itself the role of protector of the grand jury processes (see R. 248), rests its position upon two contentions, (1) the "historic principle that grand jury proceedings shall be conducted in secrecy" (P's Br. p. 38), and (2) the fear that production here will discourage "free and untrammeled disclosures by persons [testifying before future grand juries] who have information with respect to the commission of crimes" (P's Br. p. 40).*

We do not, of course, dispute the existence of a so-called "historic principle" in favor of grand jury secrecy. We do not, for example, ask that the deliberations of the grand jurors be disclosed. However, so far as the testimony of grand jury witnesses is concerned, there has never been a guarantee of more than temporary secrecy.

The witness' privilege of secrecy does not survive the discharge of the grand jury. *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4; 8 *Wigmore on Evidence* (3d ed., 1940) § 2362. As Wigmore explains (§ 2362):

> "The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury.
>
> * * * * *
>
> "But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able

*Indeed, in the court below plaintiff admitted that "were it not for the * * * fact that the examination was conducted before a grand jury, I would think that there would be some weight to be given to their [defendants'] claim" (R. 192).

to complex controversies [is threatened]" (13 F. R. D. at p. 64). The Report added (13 F. R. D. at p. 65):

> "The person who must insure that a case of this nature is thoroughly prepared prior to the trial is the trial judge himself."

Among the steps in the pre-trial phases recommended in the Judicial Conference Report are (13 F. R. D. at p. 72):

> "to insure that counsel for all parties are thoroughly prepared for the trial *according to the requirements of the trial judge* as to an efficient and economical presentation of evidence and argument;
>
> "to insure that each party is as well informed as circumstances permit concerning what his adversary will proffer; * * *."

In order properly to discharge these responsibilities and properly to channel the proceedings, the judge must necessarily have broad discretionary powers and the Rules of Civil Procedure endow him with them.

The trial judge in this case undertook these responsibilities early in the proceedings. From its inception, one troublesome aspect of the instant case, as the court saw it, was the great advantage in preparation possessed by plaintiff (R. 127, 218, 233, see also 526). As the court expressed it on one occasion (R. 127, 233):

> "One of my concerns is that since plaintiff has been preparing its case for probably three years, or longer [over four years by the time the grand jury transcript motions were argued and more than six years now], how long must we wait for defendants to prepare their case? The sooner defendants are informed of plaintiff's factual contentions, the sooner defense preparation can commence—and not before, obviously."

As the Appendix to the District Court's opinion of April 17, 1956, plainly shows (R. 218-240), the trial judge was very alive to the problems raised and the needs of the parties. From extended contact wtih the case he knew, better than anyone else, what complications and expenditure of time and money lay ahead if the motions were not granted. His "motives" were to avoid years of "inadequate, unrewarding procedure" (R. 307). He knew that the transcripts were the only source from which defendants could get needed information which plaintiff had and which defendants lacked and that resort to depositions of 28 to 30 witnesses would be not only wasteful, but inadequate, in a case of this kind.

Thus, with respect to this litigation not only are there no policy considerations militating against disclosure of the transcripts, but the objective of securing the efficient and fair administration of this case was advanced by the court's order for production.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 51

UNITED STATES OF AMERICA, *Appellant*

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY, AND THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC., *Appellees.*

On Appeal From the United States District Court for the District of New Jersey

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BRIEF OF APPELLEE, THE ASSOCIATION OF AMERICAN SOAP & GLYCERINE PRODUCERS, INC.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the statutory provisions, and the provisions of the Federal Rules of Civil Procedure, set forth on pages 2 to 5, inclusive, of the Appellant's Brief, the following Constitutional provisions and provisions of the Federal Rules of Civil Procedure are pertinent:

CONSTITUTIONAL AMENDMENT V—CAPITAL CRIMES; DUE PROCESS

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

CONCLUSION

The appeal should be dismissed or, in the alternative, the judgments below should be affirmed without considering the merits on the ground that the judgments were invited and consented to by plaintiff.

If the propriety of the order directing the production of the grand jury transcripts is to be reviewed, the judgments below should be affirmed on the ground that the District Court did not abuse its discretion in ordering disclosure of the grand jury transcripts.

Dated: April 11, 1958.

Respectfully submitted,

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